

## Maryland Journal of International Law

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Volume 30

Issue 1 *Symposium: "Investor-State Disputes"*

Article 11

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# Just Your Run-of-the-Mill Sovereign Debt Crisis: An Analysis of *Republic of Argentina v. NML Capital, Ltd.*

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### Recommended Citation

Jordan Reth, *Just Your Run-of-the-Mill Sovereign Debt Crisis: An Analysis of Republic of Argentina v. NML Capital, Ltd.*, 30 Md. J. Int'l L. 132 (2015).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol30/iss1/11>

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## NOTE

Just Your Run-of-the-Mill  
Sovereign Debt Crisis: An Analysis of  
*Republic of Argentina v. NML Capital, Ltd.*

JORDAN M. RETH<sup>†</sup>

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I. INTRODUCTION

In 2014, the Supreme Court of the United States decided a highly sensitive and controversial dispute between a group of international investors and the country of Argentina. In *Republic of Argentina v. NML Capital, Ltd.*,<sup>1</sup> the Court considered whether the Foreign Sovereign Immunities Act of 1976 (FSIA)<sup>2</sup> limited the scope of discovery available to a judgment creditor in post-judgment execution proceedings against a foreign sovereign.<sup>3</sup> The majority opinion found that while the FSIA grants jurisdictional and execution immunity to foreign sovereigns, it contains no “plain statement” on post-judgment discovery against a foreign sovereign.<sup>4</sup> Through this textual silence, the majority held that the FSIA does not preclude discovery of Argentina’s extraterritorial assets in post-judgment proceedings.<sup>5</sup>

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1. (*Discovery Case*), 134 S. Ct. 2250 (2014).

2. 28 U.S.C. §§ 1330, 1330, 1332, 1391(f), 1441(d), 1602–1611 (1976).

3. *Discovery Case*, 134 S.Ct. at 2253.

4. *Id.* at 2256–57.

5. *Id.*

Although the majority rendered a judgment that supposedly aligned with a strict textual interpretation of the FSIA, the opinion focused squarely on the absence of an affirmative command in the FSIA, while disregarding the broader purpose of the statute. Importantly, the Court ignored the relevancy requirement of discovery found in the Federal Rules of Civil Procedure (FRCP), thereby permitting transnational fishing expeditions.<sup>6</sup> The majority opinion also casts aside considerations of international comity and reciprocity in international relations.<sup>7</sup> The majority also fails to acknowledge the distinct position of a sovereign state as a debtor. Consequently, U.S. courts will be embroiled in complex transnational discovery disputes and will be required to equitably balance interests between the United States, other sovereign nations, and nonparties—a task the Supreme Court has made much more difficult.

Part I of this Note describes the historical background to the Argentine default and the procedural background of the *NML Capital* case. Part II discusses the legal background of *NML Capital* by first examining the history of sovereign immunity in the United States and the enactment of the FSIA. Part II then analyzes U.S. discovery as it is conducted domestically and the tensions it encounters abroad. Part III addresses the Supreme Court's reasoning in the *NML Capital* case and its conclusion that the FSIA does not preclude discovery of Argentina's extraterritorial assets. Part IV argues that the majority in *NML Capital* erred because it selectively interpreted the FSIA and failed to recognize that requested discovery must be relevant, as dictated by the FRCP. Furthermore, Part IV argues that the majority's disregard of international comity and reciprocity will hurt the United States and its interests abroad, and that the Court's treatment of the Argentine default as a "run-of-the-mill" debt crisis is a reductive error that will have far-reaching implications.

## II. THE CASE

Petitioner, the Republic of Argentina, and respondent, NML Capital, Ltd., have been embroiled in litigation battles regarding the lack of bond repayment for over a decade.<sup>8</sup> While the courts have

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6. FED. R. CIV. P. 26(b)(1).

7. See David E. Teitelbaum, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 854 (1986) (noting that "[c]omity is a type of reciprocal recognition of domestic laws between friendly countries").

8. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012) (discussing the Republic of Argentina's default on payment of external debt beginning in December 2001).

been quick to note that Argentina has made many contributions to the law of foreign insolvency,<sup>9</sup> the most recent default that set in motion the litigation at issue began in December 2001, when Argentina announced a moratorium<sup>10</sup> on its debt service payments.<sup>11</sup> This is possibly the largest and most complex default in global history.<sup>12</sup>

### *A. Background to the Argentine Default*

Though Argentina's economy was robust at the beginning of the 1900s, a century-long economic decline,<sup>13</sup> and a sharp downturn in the 1980s,<sup>14</sup> led to the implementation of a convertibility system by 1991.<sup>15</sup> This policy, which guaranteed a fixed exchange rate for Argentine pesos to U.S. dollars, managed to stave off inflation and encourage investors to seek out Argentina as a lucrative and stable option for foreign investment.<sup>16</sup> Indeed, Wall Street actively marketed Argentina to its investors.<sup>17</sup> Through the mid-to-late 1990s,

9. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) (noting that Argentina's history of default and restructuring of sovereign debts has produced a "rich literature" beginning with its London Stock Exchange bond default in 1827).

10. See Alice de Jonge, *What are the Principles on International Law Applicable to the Resolution of Sovereign Debt Crises?*, 32 POLISH Y.B. INT'L L. 129, 141 (2012) (discussing how debt moratoria can take the form of a complete or partial cessation of payment for a permanent or limited period of time, and usually are viewed as unilateral attempts by debtor states to bring about debt restructuring).

11. *EM Ltd.*, 473 F.3d at 466.

12. Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 317 (2005).

13. See JIM SAXTON, U.S. CONG. JOINT ECON. COMM., ARGENTINA'S ECONOMIC CRISIS: CAUSES AND CURES, 2, 6 (2003) (referencing the "economic boom" in Argentina in the late 1800s; noting that, in 1913, Argentina's GDP per person was seventy-two percent of the U.S. level (higher than France, Germany, or Sweden's), but that by 1990, this economic measure was just twenty-nine percent of the U.S. level—far below all Western European countries).

14. *Id.* at 1 (discussing the peso convertibility and exchange systems in which many Latin and South American countries were engaging, as well as the subsequent currency devaluations and economic crises).

15. Convertibilidad del Austral [Austral Convertibility], Law No. 23.928, Mar. 27, 1991, B.O. 27104 (Arg.); Moneda de Curso Legal – Cambio de Denominación y Valor de Billetes y Moneda [Legal Currency – Change of Designation and Value of Banknotes and Currency], Decree No. 2128/91, Oct. 10, 1991, B.O. 27243 (Arg.). See also Saxton, *supra* note 13, at 4.

16. SAXTON, *supra* note 13, at 4. See also Paul Blustein, *Argentina Didn't Fall on Its Own*, WASH. POST (Aug. 3, 2003), <http://www.washingtonpost.com/wp-dyn/articles/A15438-2003Aug2.html>.

17. Blustein, *supra* note 16 (describing the Goldman Sachs report, "A Bravo New World" sent to clients in 1996, praising the country's commitment to the peso convertibility system which was seen to be particularly lucrative to investors, also noting the habit of rating the performance of mutual and pension funds higher for investing in emerging markets with large debt; Argentina was often No. 1 during

Argentina's economy expanded, with firms such as Goldman Sachs, Morgan Stanley, and Credit Suisse First Boston building a presence in Argentina, and facilitating the sale of bonds.<sup>18</sup> It is estimated that securities firms made nearly \$1 billion in fees underwriting Argentina government bonds from 1991 to 2001.<sup>19</sup>

In addition to Argentina's commitment to the convertibility exchange system, the country's swift and extensive deregulation efforts made the country attractive to foreign investors.<sup>20</sup> Bypassing many of the normal and generally slower legislative channels, President Carlos Menem enacted a number of deregulation reforms by emergency decree.<sup>21</sup> While this deregulation attracted investors and helped modernize Argentina's utilities, there was a growing shadow of unemployment threatening economic stability.<sup>22</sup> Furthermore, there was increasing complacency among Argentine government officials regarding spending in light of the "easy" investment money coming in from foreign sources.<sup>23</sup>

Impacted by currency crises in other countries that increased interest rates and wreaked havoc on its economy, Argentina experienced economic recessions in 1995 and 1998.<sup>24</sup> Increased political instability further harmed the Argentine economy.<sup>25</sup> As

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the 1990s).

18. *Id.* See also SAXTON, *supra* note 13, at 7 (finding that Argentina attracted extensive foreign investment).

19. Blustein, *supra* note 16.

20. See *id.* (discussing the 1996 Goldman Sachs investment report that praised President Carlos Menem's deregulation reforms). See also, NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 307–08 (2007) (discussing the Goldman Sachs investment report entitled "A Bravo New World," where Argentina and other countries were praised for their massive privatization efforts).

21. See SAXTON, *supra* note 13, at 7 (noting that a possible reason for this route was that Menem was facing opposition to reforms, even within his own Peronist Party, due to a lack of transparency and the monopolistic character of many of the reforms).

22. *Id.*

23. See Blustein, *supra* note 16 (quoting former Secretary of Economic Policy for Argentina, Rogelio Frigerio, "[i]f you get the money so easily as we did, it's very tough to tell the politicians, 'Don't spend more, be more prudent,' because the money was there, and they knew it").

24. *Id.* See also SAXTON, *supra* note 13, at 8 (suggesting that the currency crises in Russia and particularly Brazil, Argentina's largest trading partner, contributed to the 1998 recession).

25. See SAXTON, *supra* note 13, at 8–9 (noting that Fernando de la Rúa, who succeeded President Menem in 1999, facing "widely differing ideas about economic policy," the resignation of de la Rúa's Vice President, Carlos Alvarez, in 2000, and three resignations of three different economy ministers within three weeks in 2001, further destabilized the Argentine government).

Argentina became a less attractive investment opportunity, capital began to leave the country. This led the International Monetary Fund (IMF) to grant stand-by loans to Argentina in 2000 and 2001 that totaled nearly \$22 billion.<sup>26</sup>

The reality of massive bond payments coming due in 2001, however, threatened to push the Argentine economy to the brink.<sup>27</sup> In March 2001, Argentina entered into high interest refinancing deals, or “debt swaps” of its bonds, which Wall Street banks suggested and managed.<sup>28</sup> Despite forecasts for Argentina’s default, the seven firms managing the refinancing deal pushed it through, making an estimated \$100 million in fees.<sup>29</sup> The debt swap was only a short-term solution, delaying the inevitable repayment, but now at higher interest rates.<sup>30</sup>

Despite another installment of the IMF stand-by loans, by November 2001, money was flying out of the country and Argentina imposed extraordinary measures on withdrawals, essentially freezing bank accounts.<sup>31</sup> After rioting and another change in political regime, Argentina defaulted on its debts at the end of 2001.<sup>32</sup> Argentina’s President declared a “temporary moratorium” on payments of a large portion of its debt, including the bonds under the debt swaps.<sup>33</sup>

In January 2005, Argentina presented a unilateral restructuring offer to bondholders, which 76% of the parties accepted.<sup>34</sup> In 2010, another restructuring offer was presented to bondholders and nearly all of them accepted the voluntary terms, except a small minority

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26. See SAXTON, *supra* note 13, at 12 (noting that like other IMF loans, it disbursed in installments, but unlike other IMF loans, it was the largest approved for any country in history).

27. Blustein, *supra* note 16.

28. See *id.* (noting that David Mulford, chairman international of Credit Suisse First Boston, met with Argentine economy minister Domingo Cavallo to propose a “debt swap” where Argentina’s bondholders could voluntarily exchange old bonds for new bonds, delaying the impending payments to a later time in an effort to give Argentina “breaking space” to begin an economic recovery).

29. *Id.*

30. See also SAXTON, *supra* note 13, at 12 (noting that while debt swaps reduced debt repayments in the short term, they resulted in higher repayments later).

31. Blustein, *supra* note 16.

32. *Id.*

33. NML Capital, Ltd. v. Republic of Argentina (*Equal Treatment Case I*), 699 F.3d 246, 251 (2d Cir. 2012) (noting that as of 2012, Argentina has passed legislation renewing the moratorium and has made no principal or interest payments on its debts).

34. Porzecanski, *supra* note 12, at 317.

including NML Capital.<sup>35</sup> In February 2012, the U.S. District Court for the Southern District of New York signed an order,<sup>36</sup> affirmed by the Second Circuit Court of Appeals in October 2012,<sup>37</sup> enjoining Argentina from paying the restructured bondholders before the holdout bondholders.<sup>38</sup> Negotiations between the holdouts and Argentina were largely futile,<sup>39</sup> resulting in another default for Argentina—this time affecting the payments to restructured bondholders.<sup>40</sup>

### *B. Background to the Case*

NML Capital, a hedge fund, and other investors began to buy Argentina's distressed debt<sup>41</sup> through secondary markets as early as 1998 and as recently as June 2010.<sup>42</sup> While the discount on distressed debt can vary between 20% and 80%,<sup>43</sup> NML Capital's purchase of distressed Argentine debt has been described as "cents on the dollar."<sup>44</sup> It is precisely this discount that makes distressed debt

35. See H.C., *Argentina and the Holdouts: A Fight Without a Hero*, THE ECONOMIST (Aug. 15, 2014, 12:51 PM) <http://www.economist.com/blogs/americas/view/2014/08/argentina-and-holdouts> (noting that 93% of Argentina's bondholders opted to restructure).

36. Order, NML Capital, Ltd. v. Republic of Argentina, No. 08-cv-6978 (TPG) (S.D.N.Y. Feb. 23, 2012) (granting injunctions to specifically enforce the *pari passu* clause in Argentina's debt documentation).

37. *Equal Treatment Case I*, 699 F.3d at 246.

38. See generally, Romain Zamour, *NML v. Argentina and the Ratable Payment Interpretation of the Pari Passu Clause*, 38 YALE J. INT'L. L. ONLINE 55 (2013) (discussing the impact of the "ratable payment" interpretation on sovereign debt restructuring and how it may be limited to the facts).

39. H.C., *Argentina and the Holdouts Tick Tock*, THE ECONOMIST (Jul. 17, 2014, 10:17 AM) [hereinafter *Tick Tock*], <http://www.economist.com/blogs/americas/view/2014/07/argentina-and-holdouts>.

40. *Id.*

41. See Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives*, 16 AM. BANKR. INST. L. REV. 69, 75 (2008) (describing distressed debt investing as purchasing the "debt of a financially troubled company at a discount against the face value of the debt"). See also Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STAN. J. INT'L 253, 254 (2003) (noting that funds "specializing in distressed assets—also known as 'vulture funds'—are a new species of holdout creditor that has emerged . . . [becoming] a creditor by way of the secondary market, purchasing sovereign debt at a discount . . . [refusing] to participate in any voluntary restricting, [and] attempt[ing] to use litigation to collect from the sovereign debtor the full face value of its claim"; also noting that the term "vulture fund" is a pejorative").

42. *Equal Treatment Case I*, 699 F.3d at 251.

43. See Harner, *supra* note 41, at 75.

44. *Eighth Time Unlucky*, THE ECONOMIST (Aug. 2, 2014) <http://www.economist.com/news/leaders/21610263-cristina-fernandez-argues-her-countrys-latest-default-different-she-missing> (noting the description of hedge funds

attractive to investors. Despite the risks, distressed debt investors will attempt to make a profit through restructuring deals, selling the debt, or, similar to NML Capital's strategy, by resorting to the courts to recover the full value of the debt.<sup>45</sup>

NML Capital has filed eleven actions against Argentina in the U.S. District Court for the Southern District of New York.<sup>46</sup> The hedge fund has won five money judgments in its favor totaling (with interest) nearly \$1.6 billion.<sup>47</sup> In the remaining six actions, NML Capital was granted summary judgments with claims totaling (with interest) more than \$900 million.<sup>48</sup> Argentina, however, has refused to satisfy these judgments, calling NML Capital "extortionists" and decrying the U.S. court rulings as unjust.<sup>49</sup> Argentina cites orders enjoining the country from paying the restructured debt holders<sup>50</sup> and a "Rights on Future Offers" (RUFO)<sup>51</sup> clause in the restructured bond deals as reasons for not paying NML Capital.

In an effort to enforce the judgments, NML Capital has made many attempts to gain discovery concerning Argentina's assets in the United States and around the world.<sup>52</sup> One of the more notable attempts was a 2012 Ghanaian Superior Court judgment,<sup>53</sup> resulting

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as "vulture funds" by Argentina and those opposed to this practice).

45. See Harner, *supra* note 41, at 75.

46. *EM Ltd., v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012); see also J.F. HORNBECK, CONG. RESEARCH SERV., R41029, ARGENTINA'S DEFAULTED SOVEREIGN DEBT: DEALING WITH THE "HOLDOUTS" 9 (2013) (noting that in the United States, approximately 151 individual cases have been filed against Argentina in the U.S. District Court for the Southern District of New York, with 108 judgments entered at \$5.9 billion in principal and interest).

47. *EM Ltd.*, 695 F.3d at 203.

48. *Id.*

49. Sarah Marsh, *Argentine Default Looms as Time Runs Out for Debt Deal*, REUTERS (Jul. 26, 2014, 8:51 AM) <http://www.reuters.com/article/2014/07/26/us-argentina-debt-idUSKBN0FV0DH20140726>.

50. See *supra* Part I.A

51. See *Tick Tock*, *supra* note 39 (explaining that the RUFO clause written into the restructured bond deals prevents Argentina from offering a better deal to other entities than it is offering under the restructured deals, meaning if Argentina meets NML Capital's demands for payment in full, it must then pay the restructured debt holders in full; noting that there is some disagreement over the exact impact of the RUFO clause).

52. *EM Ltd.*, 695 F.3d at 203.

53. *ARA Libertad (Arg. v. Ghana)*, Case No. 20, Order of Dec. 15, 2012, available at

[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20\\_Order\\_15.1.2.2012.corr.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.1.2.2012.corr.pdf); see also Régis Bismuth, *The Path Towards an International Public Policy for Sovereign Debt Contracts*, 9 BRAZILIAN Y.B. INT'L L. 122, 123 (2014) available at <http://www.regisbismuth.com/> (explaining that the litigation



in the detention of an Argentine Navy vessel, with its crew still aboard.<sup>54</sup> Other high-profile incidents include attempts to seize the Argentine presidential plane, Tango 01,<sup>55</sup> a run-in at the Frankfurt Book Fair,<sup>56</sup> and Argentina's withholding of certain pieces of artwork from German exhibits, out of concern that they would be seized.<sup>57</sup>

In 2010, NML Capital served subpoenas on Bank of America and Banco de la Nación Argentina, two non-party financial institutions.<sup>58</sup> This was done in an attempt to gain discovery regarding how Argentina moved assets through New York and around the world, so as to “accurately identify the places and times when those assets might be subject to attachment and execution” whether in the U.S. or in foreign jurisdictions.<sup>59</sup>

Both subpoenas defined “Argentina” broadly to include the country’s “agencies, ministries, instrumentalities, political subdivisions [and] employees,” with the Bank of America subpoena including Argentina’s president, Cristina Fernández de Kirchner.<sup>60</sup> Furthermore, the Bank of America subpoena sought documents without a territorial limit.<sup>61</sup>

In post-judgment proceedings, Argentina and both non-party banks moved to quash the subpoena, while NML Capital moved to

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reached the International Tribunal of the Law of the Sea, which finally ordered the release of the vessel).

54. Agustino Fontevecchia, *The Real Story of How a Hedge Fund Detained a Vessel in Ghana and Even Went for Argentina’s ‘Air Force One’*, FORBES (Oct. 5, 2012, 6:50 PM) <http://www.forbes.com/sites/afontevecchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/>.

55. *Id.*

56. *Id.* (noting that Argentina registered at the Frankfurt Book Fair as an individual person, rather than as a sovereign, perhaps in a bid to avoid exposure, and specifically held back pieces of artwork for fear of seizures).

57. *Id.*

58. *EM Ltd.*, 695 F. 3d at 203–04.

59. *Id.*

60. *EM Ltd., v. Republic of Argentina*, 695 F.3d 201, 204 (2d Cir. 2012); Joint Appendix at 39, 77, 92, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) (No. 12-842), 2014 WL 769626, at \*47, \*57, \*84.

61. *EM Ltd.*, 695 F.3d at 204. *See* Joint Appendix at 39, *Republic of Argentina v. NML Capital, Ltd. (Discovery Case)*, 134 S. Ct. 2250 (2014) (no. 12-842), 2014 WL 769626, at \*50 (requiring specified document production for all “databases and transactional systems to which [Bank of America has] possession, custody, or control that would contain the records sought for [Argentina],” not specifying territorial limitations as Bank of America is a multinational financial institution with locations globally).

compel.<sup>62</sup> Ultimately, the district court compelled discovery, but expected the parties to “limit the subpoenas to discovery that was reasonably calculated to lead to attachable property.”<sup>63</sup> Argentina appealed the order to the Second Circuit, arguing that compelling discovery against its foreign assets abroad violates the FSIA.<sup>64</sup> The Second Circuit affirmed the discovery order, noting that the subpoenas did not attach Argentine property and were not directed to Argentina itself—but rather at third party banks—and did not infringe Argentina’s sovereign immunity.<sup>65</sup> Argentina appealed the Second Circuit’s decision to the Supreme Court.<sup>66</sup>

### III. LEGAL BACKGROUND

#### *A. Background of Sovereign Immunity in the United States and the Enactment of the Federal Sovereign Immunities Act*

##### 1. Sovereign Immunity and the Shift Toward a Restrictive Theory of Immunity

Sovereign immunity law derives from the maxim that the “King can do no wrong.”<sup>67</sup> Initially, the United States adhered to a doctrine of “absolute immunity,” meaning sovereign states were always immune from prosecution in U.S. courts.<sup>68</sup> This was first considered in *The Schooner Exchange v. McFaddon*,<sup>69</sup> where the Supreme Court held that a military ship of a foreign sovereign that maintains a

62. *EM Ltd.*, 695 F.3d at 204 (noting that before the District Court rules, NML Capital agreed to some limitations to the breadth of the subpoenas and certain confidentiality measures).

63. *Id.* at 204–05.

64. *Id.* at 205.

65. *Id.*

66. *Discovery Case*, 134 S. Ct. 2250 (2014).

67. Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 353 (1925) (discussing the tradition of English monarchy but noting that before Edward I [1239–1307] there was the “fable” of a king sued in court like an ordinary person, and noting that Saxon kings were elected to the throne, rather than assuming it through a “divine right” principle).

68. *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574 (1926) (holding that ships owned by foreign powers are immune from U.S. court jurisdiction, regardless of the nature of the ship’s conduct, essentially endorsing the theory of absolute sovereign immunity). *See also* Stephen J. Leacock, *The Joy of Access to the Zone of Inhibition: Republic of Argentina v. Weltover, Inc., and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act of 1976*, 5 MINN. J. GLOBAL TRADE 81, 85 (1996) (discussing the U.S. endorsement of the classical, or absolute, theory of sovereign immunity).

69. 11 U.S. (7 Cranch) 116 (1812).

peaceful relationship with the United States, “must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.”<sup>70</sup> The premise underlying the absolute immunity doctrine was that sovereigns were equals and one could not exercise dominion over the other.<sup>71</sup>

In 1952, the U.S. State Department joined a growing international trend and embraced a “restrictive theory” of sovereign immunity.<sup>72</sup> This meant, “immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of state, but not with respect to private acts (*jure gestoinis*).”<sup>73</sup> Essentially, the restrictive theory narrowed sovereign immunity to only the public acts conducted by the sovereign on behalf of the state.<sup>74</sup> While courts were not bound by the State Department’s shift in policy, the influx of amici briefs filed by the Executive branch in cases involving foreign sovereigns frequently persuaded the courts to follow the restrictive theory.<sup>75</sup>

## 2. The Doctrine After the Foreign Sovereign Immunities Act

While the U.S. State Department adopted a restrictive theory of sovereign immunity, it failed to outline any clear standard for implementation, and political pressure often led to inconsistent State Department intervention in cases.<sup>76</sup> By enacting the FSIA, Congress

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70. *Id.* at 147.

71. *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 302 n.1 (2d Cir. 1981) *overruled by* *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009) (noting the ancient maxim of sovereign immunity – *par in parem imperium non habet*).

72. Letter from Jack B. Tate, Acting Legal Advisor, Department of State to Acting Attorney General Philip B. Perlman (May 19, 1952), in 26 DEP’T ST. BULL., Jun. 1952, at 984 [hereinafter “Tate Letter”] (noting the trend of restricting sovereign immunity in Western Europe, as well as other areas of the world). *See also* The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels, April 10 1926, English text, available at 6 BENEDICT, *Admiralty* 239–42 (7th ed. Knauth, 1958). The treaty was signed by ten countries that originally supported the absolute theory of sovereign immunity.

73. Tate Letter, *supra* note 72, at 984.

74. *Id.*

75. *See* Leacock, *supra* note 68, at 86–87 (noting that the State Department amicus briefs often persuaded the courts).

76. *See* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (discussing how application of the newer, restrictive sovereign immunity theory “proved troublesome” as “foreign nations often placed diplomatic pressure on the State Department in seeking immunity”).

codified the restrictive theory of sovereign immunity in U.S. law and thereby reduced the role of the State Department in corresponding litigation.<sup>77</sup> As the House Report noted:

[A] principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.<sup>78</sup>

The FSIA is now the only means of establishing jurisdiction over a foreign state in a U.S. court.<sup>79</sup> A U.S. court can assert jurisdiction over a sovereign when a foreign state's actions fall within one of the enumerated exceptions, including commercial activities.<sup>80</sup> However, how Congress intended to define the terms "foreign state" and "commercial activities" has been a frequent source of confusion.

Under the FSIA, a foreign state is defined to include the "political subdivision of a foreign state or an agency or instrumentality of a foreign state."<sup>81</sup> In determining agency and/or instrumentality, courts have historically relied on the "majority ownership" analysis,<sup>82</sup> but the Supreme Court narrowed this approach

77. Leacock, *supra* note 68, at 87–88.

78. H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606–08; *see also* Republic of Austria v. Altmann, 124 S. Ct 2240, 2252–53 (2004) (holding that the FSIA applies retroactively to conduct that occurred before its enactment).

79. *See also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989) (noting that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state" in the U.S. courts).

80. 28 U.S.C. § 1605(a)(2) (2008). "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . ."

81. 28 U.S.C. § 1603(b) (2005). The section states, "[a]n 'agency or instrumentality of a foreign state' means any entity, which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . ."

82. *See* Matthew Engellenner, *The Disadvantaged Plaintiff: Is it Time to Revisit the Foreign Sovereign Immunities Act?*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 375, 383 (2012) (discussing the "majority ownership test" in regard to evaluating a foreign state's ownership interest in an entity).

in *Dole Food Co. v. Patrickson*<sup>83</sup> by holding that the majority ownership must be “direct” to meet the FSIA definition of agency or instrumentality.<sup>84</sup>

Additionally, questions of what constitutes the “commercial activities” exception have plagued the courts.<sup>85</sup> When the U.S. Supreme Court addressed the issue in *Republic of Argentina v. Weltover*,<sup>86</sup> it adopted the Second Circuit’s “private person test,”<sup>87</sup> declaring that if a sovereign performs an act that could readily be performed by a private citizen, then those actions are “commercial” within the meaning of the FSIA and the sovereign cannot invoke immunity.<sup>88</sup> Again, this is reflective of the restrictive theory of sovereign immunity that was meant to be codified within the FSIA.

All of the exceptions and nuances of the definitions aside, there is a presumption of immunity for foreign states in U.S. courts under the FSIA.<sup>89</sup> The Supreme Court has held that the FSIA confers two types of immunity upon foreign states: jurisdictional immunity under section 1604 and execution immunity under sections 1609 and 1610.<sup>90</sup>

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83. 538 U.S. 468 (2003).

84. *Id.* at 474. The court defined “direct” in terms of corporate law, citing the majority ownership of shares, as opposed to ownership through corporate tiers. *Id.* at 474–75. The court reasoned that the FSIA refers explicitly to the “ownership of ‘shares,’ showing that Congress intended statutory coverage to turn on formal corporate ownership.” *Id.* at 474.

85. *Compare* *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981), *cert. denied*, (454 U.S. 1148 (1982)) (reasoning that an activity is commercial “if the activity is one in which a private person could engage), *with* *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 (D.C. Cir. 1987) (reasoning that analysis of the “basic exchange” and not on the “facilitating features” is determinative as to whether an activity is commercial under the FSIA), *and with* *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393 (5th Cir. 1985) (basing its decision upon “the different purposes motivating the sales,” reasoning that “the essence of an act is defined by its purpose”).

86. 504 U.S. 607 (1992).

87. *See* *Texas Trading & Milling Corp.*, 647 F.2d at 300.

88. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

89. 28 U.S.C. § 1605 (2008). *See* *Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1271 (2003) (noting that a foreign state is presumptively immune under the FSIA and remains so unless one of the specific statutory exceptions applies).

90. *Discovery Case*, 134 S. Ct. at 2252.

### *B. United States Discovery – at Home and Abroad*

#### 1. The United States Adversary System and its Impact on Domestic Discovery

As a common law country, the United States employs an adversarial legal system, meaning that many of the pre-trial and trial decisions, like discovery, are left to the parties and their counsel.<sup>91</sup> This contrasts with civil law countries, which typically employ inquisitorial pre-trial and trial procedures that leave the process principally in the hands of a judge.<sup>92</sup> Within an adversarial system, the opposing parties will generally need to conduct discovery so that a trial will be “less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent.”<sup>93</sup> U.S. discovery has been described as “wide-open” when compared globally,<sup>94</sup> likely due in large part to the country’s rigorous adversarial system.<sup>95</sup>

However, the relevancy requirement in Rule 26(b)(1) is a significant limit on the scope of discovery, mandating that “[u]nless otherwise limited by court order . . . [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . . [and r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>96</sup>

In addition to the FRCP, the inherent supervisory powers of the

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91. See Michael Asimow, *Popular Culture and The Adversary System*, 40 LOY. L.A. L. REV. 653, 653 (2007) (noting that the central precept of the adversarial system is the clash of proofs presented by opposing lawyers so a neutral and passive decision maker can evaluate the information presented and resolve the dispute).

92. *Id.* at 653.

93. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) (finding that in the case at issue, the desired disclosure of grand jury materials to the defendant in a civil case did not outweigh the public policy interest in grand jury secrecy).

94. See *Discovery Case*, 134 S. Ct. at 2254 (noting that the general rule in the federal system as stated in FRCP 26(b)(1) is that, subject to the district court’s discretion, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense”). See also David Brewer, *Obtaining Discovery Abroad: The Utility of the Comity Analysis in Determining Whether to Order Production of Documents Protected by Foreign Blocking Statutes*, 22 HOUS. J. INT’L L. 525, 536 (2000) (describing the U.S. approach to discovery like the freedom of speech, premised on a “wide-open” approach to find the truth).

95. See Asimow, *supra* note 91, at 653 n.1 (noting that the U.S. employs a more extreme version of the adversarial system than any other country).

96. FED. R. CIV. P. 26(b)(1).

courts are another important source of discovery law in the United States.<sup>97</sup> The Restatement (Third) of Foreign Relations Law of the United States also provides authoritative, albeit non-binding, guidance in regard to U.S. discovery abroad.<sup>98</sup>

In *Republic of Argentina v. NML Capital*, the specific type of discovery at issue was that utilized in post-judgment execution proceedings, which are governed by FRCP 69(a)(2).<sup>99</sup> That rule permits a judgment creditor to obtain discovery from “any person—which includes a judgment debtor—as provided in [the FRCPs] or by the procedure of the state where the court is located.”<sup>100</sup> Both federal and New York state rules governing post-judgment execution discovery are generally permissive.<sup>101</sup> As with other forms of discovery, a judgment creditor who is seeking discovery in aid of execution “must proceed in good faith, and must not use disclosure devices for harassment, especially when dealing with a nonparty.”<sup>102</sup>

Nonparties are not immune from discovery orders. FRCP 37(c) provides that nonparties “may be compelled to produce documents and tangible things or to permit an inspection.”<sup>103</sup> Because a subpoena *duces tecum* is available under FRCP 45 to gain document disclosure without the need for depositions, it is typically used on nonparties,<sup>104</sup> and is intended to be “as broad against a nonparty as against a party.”<sup>105</sup>

97. See, e.g., FED. R. CIV. P. 26(c) (providing for court-imposed sanctions against parties who use discovery devices excessively without justification or who fail to comply with discovery requests). See also Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 334–35 (2006) (noting that “because a federal court could not exercise its core Article III power of adjudication without an accurate and relevant factual record, it must have the power to do those things necessary to develop an accurate and relevant factual record—including such things as managing discovery, compelling testimony, appointing experts, and excluding and admitting evidence.”).

98. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 442 (1987). See *infra* Part II.B.3.

99. *Discovery Case*, 134 S. Ct. at 2254.

100. FED. R. CIV. P. 69(a)(2).

101. *Id.* See N.Y. CIV. PRAC. LAW ANN. § 5223 (West 1997) (entitles judgment creditors to discover “all matter relevant to the satisfaction of [a] judgment.”). See also *Discovery Case*, 134 S. Ct. at 2254 (commenting on the permissive nature of the FRCP and New York Law regarding discovery).

102. 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 623 (2005).

103. FED. R. CIV. P. 34(c).

104. FED. R. CIV. P. 45.

105. *Id.* See also FED. R. CIV. P. 30(b)(6) (allowing a nonresident to be designated by the institutional deponent, thereby overcoming the “100 mile” geographic limitation of FRCP 45); Jay C. Carlisle, *Nonparty Document Discovery*

Federal courts have differed regarding what an opposing party must show when seeking post-judgment discovery in aid of execution. The Ninth Circuit has stated that if a party seeking discovery can illustrate “significant questions regarding noncompliance,” then appropriate discovery should be granted.<sup>106</sup> The Sixth Circuit has stated that, in seeking post-judgment discovery arising from a fraud on the court claim, “it [is] at least necessary” for the defendant requesting the discovery to present some proof to establish its charges of fraud.<sup>107</sup>

Of particular interest to this paper, the Third Circuit considered the impact of *NML Capital in Ohntrup v. Makin Ve Kimya Endustrisi Kurumu*,<sup>108</sup> finding that if a subject property is immune under the FSIA from attachment, “then the District Court should deny . . . [the] discovery request ‘because information that could not possibly lead to executable assets is simply ‘not relevant’ to execution in the first place.’”<sup>109</sup> However, the court noted that if the district court found the subject property was not immune, then that factor would weigh in favor of the party seeking discovery, and if the district court chooses not to decide the subject property’s immunity or lacks “sufficient information” to decide, then “any speculation in that regard should not be a factor in the [c]ourt’s unreasonable burden analysis” in deciding to grant discovery.<sup>110</sup>

## 2. The Tensions of United States Discovery in Foreign Jurisdictions

District courts are empowered to grant a motion to compel discovery in foreign jurisdictions. Under U.S. law, courts have been able to impose jurisdiction in foreign nations through the doctrine of extraterritoriality.<sup>111</sup> Courts consider several factors when determining

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*from Corporations and Governmental Entities Under the Federal Rules of Civil Procedure*, 32 N.Y.L. SCH. L. REV. 9, 37 (1987).

106. *California Dept. of Social Services v. Leavitt*, 523 F.3d 1025, 1034 (2008) (finding that a Fed. R. Civ. P. 56(f) analysis that summary judgment should not be granted while an opposing party timely seeks discovery of potentially favorable information also applies to the analysis of permitting discovery in the context of a motion to enforce a judgment).

107. *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1122 (6th Cir. 1976).

108. 760 F.3d 290 (3d Cir. 2014).

109. *Id.* at 296–97 (quoting *Discovery Case*, 134 S. Ct. at 2257).

110. *Id.* at 297 (analyzing *Discovery Case*, 134 S. Ct. at 2257–58).

111. See Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1310 (1985) [hereinafter *Predictability and Comity*] (discussing the need to develop a set of principles to



if the exercise of extraterritorial jurisdiction over a person or activity is unreasonable.<sup>112</sup> While there is a general presumption against extraterritoriality, the rise of the global economy and increased legal transactions in areas such as trademark, antitrust, and taxation have helped spur the extraterritorial application of U.S. law.<sup>113</sup> This extended reach has strained foreign relations over what is often perceived as an aggressive and inconsistent imposition of U.S. jurisdiction and has led many foreign states to enact retaliatory legislation.<sup>114</sup>

One type of retaliatory legislation used by foreign states are blocking statutes. These laws are designed to block U.S. discovery in foreign jurisdictions by imposing criminal penalties upon parties who disclose evidence.<sup>115</sup> However, even if a party faces criminal penalties in a foreign jurisdiction for compliance with a U.S. court order, that alone may not be sufficient to deny discovery.<sup>116</sup>

The seminal case analyzing motions to compel discovery in the face of foreign blocking statutes and the consideration of sanctions for the failure to comply is *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*.<sup>117</sup> In *Societe Internationale*, the Supreme Court addressed whether a case could be dismissed based on the petitioner's failure to comply with a

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evaluate alternatives to the general doctrine of extraterritorial jurisdiction).

112. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 403(2) (1987). These factors include the activity's connection to the territory (e.g. substantial or direct contact), the state seeking jurisdiction's connection to the person of which jurisdiction is desired (e.g. nationality), the character of the activity to be regulated, the existence of justified expectations that might be protected or hurt, the importance of the regulation to the international political, legal, or economic system, the regulation's consistency with traditions of the international system, the interest of the regulating state, and the likelihood of conflicts with another state's regulations.

113. Mark Gibney, Response, *Toward a Theory of Extraterritoriality*, MINN. L. REV. HEADNOTES, Spring 2011, at 81, 82 nn.4–6, <http://www.minnesotalawreview.org/headnotes/theory-extraterritoriality/>.

114. See *Predictability and Comity*, *supra* note 111, at 1310–11 n.6 (1985) (noting that retaliatory legislation falls into three main categories: secrecy statutes, blocking statutes, and “clawback” statutes).

115. See Brewer, *supra* note 94, at 526, 536 (noting that comity is complicated by the “great antipathy some foreign jurisdictions have for American style discovery”).

116. See FED. R. CIV. P. 37 (allowing a court to impose sanctions upon a party for its failure to comply with a court discovery order). While FRCP 37 does not explicitly list default judgments as a possible sanction, they have been “sustained as a valid exercise of the District Court’s power under FRCP 37(d).” In *re Uranium Antitrust Litigation*, 617 F.2d 1248, 1258 (7th Cir. 1980).

117. 357 U.S. 197 (1958).

U.S. court order for document production concerning a Swiss Bank account, when doing so would potentially violate Swiss law.<sup>118</sup> The Court held that the district court was justified in issuing a production order, despite the petitioner's risk of criminal penalties in Switzerland.<sup>119</sup>

In deciding to uphold the production order, the Court analyzed three factors.<sup>120</sup> The Court first reasoned that a decision to broadly deny discovery in all cases where a party feared criminal penalties from a foreign jurisdiction would run counter to Congress' intent in enacting the statute at issue.<sup>121</sup> Furthermore, the Court noted that the particular records at issue might have a "vital influence" in the litigation.<sup>122</sup> Finally, the Court pointed out that the petitioner is in a position to negotiate a waiver of the criminal penalty with the foreign nation, or "at least achieve a significant measure of compliance with the production order."<sup>123</sup> While these three factors helped frame the decision, the Court strictly limited the analysis to the instant case, thereby also limiting its precedential value.<sup>124</sup>

### 3. A Shifting Landscape – From a Pure Comity Approach to Balancing Tests

In choosing to limit the holding in *Societe Internationale*, the Supreme Court failed to provide a clear framework for analysis in the lower courts, leading to inconsistent evaluations of non-compliance with U.S. discovery in foreign jurisdictions.<sup>125</sup> Initially, courts

118. *Id.* Specifically, Article 273 of the Swiss Penal Code, prohibiting economic espionage, and Article 47 of the Swiss Bank Law, concerning secrecy of banking records. *Id.* at 200.

119. *Id.* at 205–06.

120. *Id.* at 204 (noting that although Swiss penal laws "did limit [the] petitioner's ability to satisfy the production order," that they did not do so to the level where the documents effectively "disappeared" or were taken into custody by a third party). *See also* Brewer, *supra* note 94, at 537 (discussing the Court's use of three factors, which have become the backbone for analyzing the suitability of production orders for foreign evidence).

121. *Societe Internationale*, 357 U.S. at 205–06 (noting that in broadening the Trading with the Enemy Act in 1941, Congress intended to reach "enemy interests which masqueraded under . . . innocent fronts," therefore, if discovery was denied in all cases where a party faced criminal penalties in a foreign jurisdiction, parties would be incentivized to seek out those jurisdictions to avoid discovery). Brewer, *supra* note 94, at 537.

122. *Societe Internationale*, 357 U.S. at 205.

123. *Id.*

124. Brewer, *supra* note 94, at 538.

125. GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 873 (3d ed. 1996); Teitelbaum, *supra* note 7, at 844.

emphasized foreign relations in deciding whether to compel U.S. discovery abroad when faced with a foreign blocking statute. The Second Circuit, noting that foreign law prohibitions on disclosure act as a bar to ordering production of documents,<sup>126</sup> developed what came to be known as the “pure comity” approach.<sup>127</sup>

Critics of the pure comity evaluation pointed out that the approach favored foreign law over U.S. substantive law, thereby encouraging the enactment of foreign blocking statutes and the creation of “information havens” to frustrate U.S. court orders.<sup>128</sup> They also argued that the pure comity approach would deny basic justice to parties seeking discovery.<sup>129</sup>

Eventually, the lower courts shifted from a pure comity approach to a number of balancing tests that varied between partial deference to foreign blocking statutes laws and total disregard for international relations.<sup>130</sup> These balancing tests analyzed factors largely based on *Societe Internationale*, the five-factor analysis in Restatement (Second) of the Foreign Relations of United States,<sup>131</sup> or

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126. See *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (noting that while the U.S. government has a real interest in obtaining evidence wherever it is located, the government also has an obligation to respect laws of other sovereign states); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) (reasoning that under “fundamental principles of international comity, [the] courts dedicated to the enforcement of . . . laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.”); *First Nat’l City Bank v. IRS*, 271 F.2d 616, 619 (2d Cir. 1959) (noting that if production of documents in Panama would violate Panamanian laws, then discovery should not be ordered).

127. See Daniela Levarda, Note, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery*, 18 FORDHAM INT’L L.J. 1340, 1364–66 (1995) (noting that this approach centered on “maintaining amicable relations with non-U.S. trading partners” by deferring to foreign blocking statutes when determining whether to compel U.S. discovery abroad).

128. Teitelbaum, *supra* note 7, at 865. Teitelbaum defines an “information haven” as “a jurisdiction whose laws are intentionally structured to attract commerce based on a promise of secrecy.” *Id.* at 848 n. 32.

129. *Id.* at 856.

130. Brewer, *supra* note 94, at 544.

131. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (listing the five-factor analysis: (a) vital national interests of each of the states; (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; (c) the extent to which the required conduct is to take place in the territory of the other state; (d) the nationality of the person; and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state).

a combination thereof.<sup>132</sup> Without a definitive standard, however, the factors were applied piecemeal—with some courts adding factors or emphasizing some over others in their analyses.<sup>133</sup> Not surprisingly, the lack of consensus among the lower courts led to inconsistent holdings.<sup>134</sup>

Partially to blame for the piecemeal application of the various factors was that the Restatement (Second) was drafted for general issues of international conflict, not specifically tailored for non-compliance issues regarding U.S. discovery abroad.<sup>135</sup> In an attempt to reconcile this, the tentative drafts and final texts of the Restatement (Third) of the Foreign Relations Law of the United States created provisions to include non-compliance with discovery in a foreign jurisdiction.<sup>136</sup> While the Supreme Court in *Societe Nationale*

132. Teitelbaum, *supra* note 7, at 856.

133. See *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288 (9th Cir. 1981) (adopting a balancing test that strictly adhered to the five-factors from Section 40 of the Restatement Second); *Minpeco v. S.A. Conticommodity Services, Inc.*, 116 F.R.D. 517, 522–23 (S.D.N.Y. July 9, 1987) (modifying the Restatement Second factors and creating a new four-part balancing test); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (emphasizing the importance of U.S. statutory policies, the importance of the requested documents to key elements of the claims, and the degree of flexibility in the foreign nation's application of its nondisclosure laws). See also Teitelbaum, *supra* note 7, at 857–58 (noting that a piecemeal application of the Restatement factors was due in part to the general conflicts provision of section 40).

134. See *Brewer, supra* note 94, at 544 (discussing the lack of consensus among the courts in regard to the various balancing tests). Compare *United States v. Vetco Inc.*, 691 F.2d 1281, 1287 (9th Cir. 1981) (affirming civil contempt orders for a failure to comply with production orders, and noting that *Societe* “held only that the district court could not dismiss a plaintiff’s complaint for failure to comply with a discovery request where the plaintiff had made extensive good faith efforts to comply”) with *In re Westinghouse Elec. Corp Uranium Contracts Litigation*, 563 F.2d 992, 997–99 (10th Cir. 1977) (holding that a lack of good faith on the part of the non-compliant party is not determinative in compelling a production order, and noting that the defense did not “stand or fall” on the discovery order).

135. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 512 (N.D. Ill. April, 13, 1984) (noting that § 40 of the Restatement “addresses international conflicts in general, and is not tailored precisely to conflicts between discovery procedures and blocking statutes”).

136. *Id.* at § 442(1)(c) (listing the revised five-factor analysis: “[i]n deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account [a] the importance to the investigation or litigation of the documents or other information requested [b] the degree of specificity of the request; [c] whether the information originated in the United States; [d] the availability of alternative means of securing the information; and [e] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located”).

*Industrielle Aérospatiale v. United States Dist. Court*,<sup>137</sup> suggested that the Restatement (Third) factors are “perfectly appropriate for courts to use” when there is no treaty to govern discovery requests, the Court did not *require* their use.<sup>138</sup> This has again led to divergent interpretations among the lower courts.<sup>139</sup>

#### 4. International Law Conflicts with U.S. Discovery Practice

While international law has attempted to provide a legal framework for transnational discovery, the results have not been harmonious. International treaties, bilateral treaties, and mutual assistance agreements<sup>140</sup> have been drafted and signed in an effort to create a more consistent and predictable transnational discovery process, but to varying results.

The United States is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention),<sup>141</sup> a multilateral treaty designed to create a measure of predictability and stability in transnational discovery proceedings.<sup>142</sup> A primary concern during the drafting of the treaty was that the taking of evidence on foreign soil could be inconsistent with the laws of the country where the litigation takes place, creating

137. 482 U.S. 522 (1987).

138. *Id.* at 556. See also *infra* Part II.B.4 (discussing *Aérospatiale*'s departure from first resort to the Hague Evidence Convention for a comity analysis).

139. See, e.g., *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 246 (S.D.N.Y. Dec. 6, 2010) (acknowledging that the U.S. Supreme Court has identified these factors as relevant in the analysis, but then stating two additional factors to consider: whether “any hardship to the responding party would suffer if it complied with the discovery demands and whether the responding party has proceeded in good faith”).

140. Mutual Legal Assistance Treaties (MLAT) are instruments that assist in taking evidence in a country for criminal matters and will not be further discussed in this Note. See Mark K. Gyandoh, *Foreign Evidence Gathering: What Obstacles Stand in the Way of Justice?*, TEMP. INT'L & COMP. L.J., Spring 2001 at 81, 89 (2001) (discussing the appearance of MLATs in the mid-twentieth century in order to compel countries to assist each other, including in criminal evidentiary matters).

141. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter *Hague Evidence Convention*] (consisting of a multilateral treaty, of which the United States became a signatory in 1972). See also George A. L. Droz, *A Comment on the Role of the Hague Conference on Private International Law*, 57 LAW & CONTEMP. PROBS. 3, 3–4 (1994) (discussing the first Hague Convention on Civil Procedure, which was revised in 1905 and ratified in 1954, but by 1965 was broken into three “modern” conventions for Service, Evidence, and a final convention combining legal aid, deposits for costs, safe conduct of witnesses, and detention of foreign debtors).

142. Brewer, *supra* note 94, at 531.

conflict and leading to ineffective results for litigants.<sup>143</sup> Therefore, the Hague Evidence Convention provides that local judicial or government officials be included in most evidence gathering functions allowed under the treaty's terms.<sup>144</sup> While this seems to be workable in theory, the Hague Evidence Convention has become a source of litigation within the United States regarding its interpretation and impact upon U.S. courts' ability to compel transnational discovery.<sup>145</sup>

The language in the Hague Evidence Convention itself creates a number of tensions that run counter to the consistent and harmonious framework it was intended to create. First, the treaty incorporates a number of provisions allowing signatories to opt out of certain procedures.<sup>146</sup> Furthermore, the treaty does not address judicial supervision and the amount of supervision required to appropriately execute an extraterritorial discovery request, thereby doing nothing to reconcile the difference in discovery proceedings between civil and common law jurisdictions.<sup>147</sup> Moreover, the Hague Evidence Convention does not advance a specific relevancy standard, again creating a rift among countries and fragmentation in application of the treaty.<sup>148</sup>

Apart from standards absent from the treaty, U.S. courts diverged on how to interpret the Hague Evidence Convention, especially before the determinative case, *Aérospatiale*.<sup>149</sup> At least one district

143. *Id.*

144. *Id.* See also *Hague Evidence Convention*, *supra* note 142, at arts. I, II, VIII, and IX.

145. See Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on its Role in U.S. Civil Procedure*, 57 *LAW & CONTEMP. PROBS.* 77, 79 (1994) (explaining that the Hague Evidence Convention has been frequently litigated in the United States, primarily regarding its "exclusivity" or when (if at all) the treaty's discovery procedures must be used in place of U.S. discovery mechanisms).

146. See *Hague Evidence Convention*, *supra* note 142, at arts. IX, XII, XXIII, XXXIII. Article IX mandates that a state executing a letter of request shall apply its own laws regarding procedure; article XII permits a signatory to refuse letters of request under certain conditions; article XXIII permits signatories to opt out of certain pre-trial discovery obligations; article XXXIII permits signatories to opt out of obligations regarding the taking of evidence by diplomatic officers, consular agents, and commissioners.

147. *Levarda*, *supra* note 127, at 1349.

148. *Id.* (citing *FED. R. CIV. P.* 26) (noting that while some signatories have left relevancy determinations to judges based on the substantive issues in particular cases, the United States has found relevancy to be satisfied "as long as it is reasonably calculated to result in the procurement of admissible evidence").

149. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court (Aérospatiale)*, 482 U.S. 522 (1987).

court disagreed with a plaintiff's argument that the Hague Evidence Convention was "intended merely to supplement the less restrictive means provided by the [FRCP]," suggesting it may be the exclusive means of obtaining discovery within a foreign signatory nation.<sup>150</sup> The Court of Appeals of Texas held in another case that the Hague Evidence Convention procedures must be complied with as an "avenue of first resort."<sup>151</sup> The Fifth Circuit, in contrast, held that the Hague Evidence Convention contains no express provisions for exclusivity and that it does not supplant the FRCP discovery provisions when production of evidence involves individuals subject to *in personam* jurisdiction of a U.S. court.<sup>152</sup>

In *Aérospatiale*, the Supreme Court held that the Hague Evidence Convention was not the exclusive means of obtaining discovery within a foreign jurisdiction.<sup>153</sup> The Court noted that, while "judicial supervision of discovery should always seek to minimize its costs and inconvenience," it is sometimes necessary to seek transnational discovery.<sup>154</sup> Therefore, "the district court must supervise pretrial proceedings" to prevent abuse of discovery devices.<sup>155</sup> In deciding this, however, the Court did not sweep consideration of international relations aside, stating:

[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for

150. *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Penn. 1983) (noting that permitting "one sovereign to foist its legal procedures upon another whose internal rules are dissimilar would run afoul of the interests of sound international relations and comity"). *See also* Brewer, *supra* note 94, at 533.

151. *Sandsend Financial Consultants, Ltd. v. Wood*, 743 S.W.2d 364, 365 (Tex. App. 1988) (quoting *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. App. 1984)) (declining to hold that the Hague Evidence Convention's procedures are mandatory).

152. *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 615 (5th Cir. 1985) (finding that a German corporation, subject to court jurisdiction under Louisiana long-arm statute, was subject to federal discovery rules).

153. *Aérospatiale*, 482 U.S. at 544.

154. *Id.* at 546.

155. *Id.*

any sovereign interest expressed by a foreign state.<sup>156</sup>

Significantly, but unhelpfully, the Court declined to articulate specific standards or factors to guide this most “delicate task” of balancing U.S. and foreign interests.<sup>157</sup> This left transnational discovery not only still in disarray, but also with new U.S. precedent that chipped away at any harmonizing efforts the Hague Evidence Convention was able to accomplish.

However, the Hague Conference yielded another treaty relating to transnational discovery: the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention),<sup>158</sup> which attempted to streamline the process for service of transnational parties through a number of mechanisms, including requiring signatories to create central authorities for the delivery of service.<sup>159</sup>

As with the Hague Evidence Convention, the Hague Service Convention also created confusion, particularly in the United States regarding whether the Convention permitted service upon a foreign corporation through its wholly-owned and closely-controlled U.S. subsidiary as an involuntary agent.<sup>160</sup> The Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Schlunk*,<sup>161</sup> held that the Hague Service Convention does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation’s involuntary agent for service.<sup>162</sup> The *Schlunk* decision thereby not only depleted the Convention’s effectiveness, but also created further uncertainty in the process of

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156. *Id.* at 546.

157. *Id.*

158. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 [hereinafter *Hague Service Convention*] (consisting of a multilateral treaty – to which the United States is a signatory, which entered into force Feb. 10, 1969 – that attempted to provide a simpler way to serve process abroad, while assuring fair notice and proof of service).

159. See Elizabeth L. Cocanougher, *The Hague Service Convention as Enabler: Volkswagenwerk Aktiengesellschaft v. Schlunk*, 20 U. MIAMI INTER-AM. L. REV. 175, 176 (1988) (discussing the central authority for delivery of service under the Hague Service Convention).

160. *Id.*

161. 486 U.S. 694 (1988).

162. *Schlunk*, 468 U.S. at 700–04 (noting that while the Convention does not provide an express standard for “service abroad,” the drafting committee history and Articles 15 and 16 of the Convention indicate that a “notification au parquet” (service upon a foreign defendant by the deposit of documents with a designated local official) were to be eliminated from the Convention).



transnational discovery.<sup>163</sup>

#### IV. THE COURT'S REASONING IN ARGENTINA VS. NML CAPITAL

In a 7–1 decision written by Justice Scalia<sup>164</sup> the Court held that the FSIA did not preclude discovery of Argentina's extraterritorial assets.<sup>165</sup> The Court noted that the general rule for federal discovery is that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," notwithstanding the discretion of the district court.<sup>166</sup> The Court noted that Argentina had not raised this as an issue, so the Court simply assumed that "in a run-of-the mill execution proceeding . . . the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States."<sup>167</sup> The Court therefore found that it faced only a narrow question: whether the FSIA provides for immunity to discovery where the debtor is a sovereign.<sup>168</sup>

The Court's review of the post-judgment discovery motion centered upon a strict textual interpretation of the FSIA.<sup>169</sup> The majority found that under the FSIA, foreign states are provided two kinds of immunity, "jurisdictional immunity," and "execution immunity."<sup>170</sup> The Court reasoned that jurisdictional immunity was waived by Argentina and not at issue.<sup>171</sup> As far as execution immunity was concerned, the Court noted that it generally shields "'property in the United States of a foreign state' from attachment, arrest, and execution."<sup>172</sup> Focusing on the text of the statute itself, the majority stated that there was no "plain statement" in the FSIA providing a third type of immunity forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets.<sup>173</sup>

Argentina's defense, according to the Court, was based on the silence of the FSIA regarding discovery of a foreign-sovereign

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163. Cocanougher, *supra* note 160, at 195.

164. Justice Sotomayor did not take part in either Argentina decision.

165. *Discovery Case*, 134 S. Ct. at 2252.

166. *Id.* at 2254 (citing FED. R. CIV. P. 26(b)(1)).

167. *Id.* at 2255 (citing *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 208 (2d Cir. 2012)).

168. *Id.*

169. *Id.* at 2256.

170. *Id.*

171. *Id.*

172. *Id.* (citing 28 U.S.C. § 1609).

173. *Id.*

judgment debtor's assets. Argentina argued that before the enactment of the FSIA, the United States routinely accorded absolute execution immunity to foreign-state property.<sup>174</sup> Furthermore, Argentina argued that by codifying executive immunity with only a small set of exceptions, Congress merely "partially lowered the previously unconditional barrier to post-judgment relief."<sup>175</sup> The Court ultimately found this unpersuasive, stating that it was not its role to solve the riddle of what Congress may have meant, but to interpret "what Congress enacted in the FSIA."<sup>176</sup>

It is noteworthy that the majority decision did not consider whether a judgment creditor had to show that assets were recoverable in the jurisdiction *before* the court would permit discovery.<sup>177</sup> This, however, was the chief argument of Justice Ginsburg's dissent.<sup>178</sup> As Justice Ginsburg noted, "no inquiry into a foreign sovereign's property in the United States that is not 'used for a commercial activity' could be ordered; such an inquiry, as the Court recognizes, would not be 'relevant' to execution in the first place."<sup>179</sup> The dissent further questioned what authority permitted a district court in the United States to become a "clearinghouse for information" about "any and all property held by Argentina abroad?"<sup>180</sup> Finally, the dissent concluded that a limited discovery of Argentina's "property used [in the United States] or abroad 'in connection with . . . commercial activities,'" would be consistent with the FSIA and U.S. discovery law.<sup>181</sup>

## V. ANALYSIS

### *A. The Majority Analyzed Immunity Grants Under the FSIA in a Vacuum—Not Accounting for the Reality of Modern Financial Transactions*

The majority opinion stated that there are two types of immunity: jurisdictional immunity and immunity from execution.<sup>182</sup>

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174. *Id.* at 2257.

175. *Id.*

176. *Id.* at 2258 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)).

177. *Id.* at 2259 (Ginsburg, J. dissenting) (emphasis added).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 2256 (majority opinion).

It also noted that Argentina was in a unique situation as it had waived its jurisdictional immunity when it engaged in the bond deals with foreign investors.<sup>183</sup> The “uniqueness” of this position, however, is debatable. Wall Street and most major global financial institutions are based in New York and select New York law as the “choice of law” for many agreements precisely for its pro-business laws and regulations.<sup>184</sup> Firms have massive bargaining power and incentive to induce nations to sign deals that waive the FSIA jurisdictional immunity and/or consent to New York law before opening the flow of capital. In light of the favorable decisions the holdouts have been able to gain in the Southern District of New York and the Second Circuit, sovereign jurisdictional waiver and New York choice of law can hardly be considered unique.

The second type of immunity under the FSIA is immunity from execution. The majority narrowly interpreted this type of immunity to exclude discovery-in-aid of execution and to apply only to sovereign property within the United States.<sup>185</sup> This interpretation, however, inappropriately emphasizes geographical boundaries and fails to consider the vital component of relevancy in discovery. While the majority correctly noted that U.S. courts “generally lack authority . . . to execute against property in other countries,”<sup>186</sup> the suggestion that the FSIA permits discovery against non-attachable extraterritorial sovereign property is out of step with the FSIA and the FRCP.

The majority opinion thus carved out a greater exception to immunity than Congress intended. Legislative history and prior U.S. court decisions suggest that Congress only wanted to “partially lower the barrier of immunity from execution,” not drastically reduce or alter it.<sup>187</sup> The FSIA codified the restrictive theory of immunity, a

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183. *Id.*

184. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1486 (2009).

185. *Discovery Case*, 134 S. Ct. at 2252; 28 U.S.C. § 1609 (2009).

186. *Discovery Case*, 134 S. Ct. at 2257.

187. H.R. REP. NO. 94-1487, (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6604, 1976 WL 14078. See also *Conn. Bank of Commerce v. Congo*, 309 F.3d 240, 252 (5th Cir. 2002) (noting that in H.R. REP. NO. 94-1487, Congress only partially lowered the barrier of immunity from execution, in order to make it conform more closely with jurisdictional immunity; noting that immunity from execution is more narrow); *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (noting that Congress passed the FSIA based on the “views of sovereignty expressed in the 1945 charter of the United Nations and the 1972 enactment of the European Convention, which left the availability of execution totally up to the debtor state,”

narrow restriction on the traditional absolute immunity accorded sovereign states.<sup>188</sup> If Congress wanted to create a greater restriction on immunity, it would have done so.

*B. The Majority's Decision Overlooked the Relevancy Requirement of U.S. Discovery*

U.S. courts have interpreted the FSIA to mean that Congress "create[d] rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments."<sup>189</sup> The FSIA does not create an affirmative right for judgment creditors to gain discovery about property without first showing that there is a reasonable chance of execution against the extraterritorial property.

The relevancy requirement in U.S. discovery rules is designed to discourage "fishing expeditions." Nonetheless, fishing for information is precisely what NML Capital wishes to do and what the majority opinion now permits. As the dissent correctly noted, "NML does not yet know what property Argentina has [outside the United States], let alone whether it is executable under the relevant jurisdiction's law."<sup>190</sup> But by permitting NML Capital to seek information about Argentina's "worldwide assets generally," the majority stated that the hedge fund will then be able to "turn up" information about Argentina's assets.<sup>191</sup> That information may or may not yield assets subject to execution, the majority conceded, but it noted that "Argentina's self-serving legal assertion" – if a party cannot execute a judgment against property, it should not pursue discovery of information about that property – will not automatically "prevail."<sup>192</sup> Ultimately, the majority found that the U.S. District Court for the Southern District of New York will "have to settle the matter," as a clearinghouse for information regarding Argentina's worldwide assets.<sup>193</sup>

Yet Argentina's "self-serving legal assertion" is not so deviant as the majority would portray. Essentially, Argentina argues that discovery must be relevant in order to be valid. This is completely in

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and only lifted the immunity from execution "in part").

188. See *supra* Part II.A.

189. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010).

190. *Discovery Case*, 134 S. Ct. at 2259 (Ginsburg, J., dissenting).

191. *Id.* at 2258 (majority opinion).

192. *Id.* at 2257–58.

193. *Id.*

line with U.S. discovery rules under the FRCP.<sup>194</sup> In fact, the majority conceded that “information that could not possibly lead to executable assets is simply not ‘relevant’” and would render subpoenas seeking that type of information unenforceable.<sup>195</sup> But because NML Capital’s subpoenas do not expressly state that they are seeking information that “could *not* lead to executable assets in the United States or abroad,” the majority found them permissible—again emphasizing that NML Capital does not yet know where Argentina’s property is located and should be given leave to search the world to turn up information about Argentine assets.<sup>196</sup>

Incredibly, the majority found that since neither party expressly raised the issues of relevancy and the recoverability of extraterritorial assets, it did not need to decide the issue.<sup>197</sup> Notwithstanding the fact that relevancy is central to discovery,<sup>198</sup> the majority then by its own logic, should have deferred to the Second Circuit, which recognized in regard to extraterritorial assets that post-judgment discovery “must be calculated to assist in collecting on a judgment.”<sup>199</sup> The Second Circuit further noted that the lower court was “well within [it’s] discretion to limit discovery where the plaintiff had not demonstrated any likelihood that the discovery it sought related to attachable assets.”<sup>200</sup> Though the discovery requests do not violate the FSIA, they run counter to the long-standing requirements that for discovery requests to be valid, they must be relevant.

*C. The Majority Unduly Minimized the Significance of Foreign Blocking Statutes and the Treatment of State-Owned Entities*

In addition to narrowly interpreting immunity grants under the FSIA, the majority in *NML Capital* ignored the possibility that those compelled to produce discovery may face criminal penalties for their non-compliance. Both sides of the pendulum are unworkable. Never allowing discovery when a party faces criminal penalties would be a doctrine susceptible to abuse and would undermine the authority of U.S. courts. Conversely, compelling discovery regardless of criminal penalties puts those subject to discovery requests in a “catch-22” of

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194. *See supra* Part II.A.

195. *Discovery Case*, 134 S. Ct. at 2257–58.

196. *Id.* (emphasis added).

197. *See id.* at 2254 (stating that the Court “need not take up those issues today”).

198. FED. R. CIV. P. 26(b)(1).

199. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 209 (2d Cir. 2012) (citing FED. R. CIV. P. 26(b)(1), 69(a)(2)).

200. *Id.*

either facing criminal penalties in a foreign jurisdiction or contempt of court sanctions in the United States. Lower courts require a clear and consistent analysis that can equitably determine when to compel production of discovery in these instances.

The Supreme Court, however, has clearly and consistently denied lower courts such guidance. In *Societe Internationale*,<sup>201</sup> the Court failed to create a decision with precedential value by limiting the analysis to the particular facts of the case.<sup>202</sup> In *Aérospatiale*,<sup>203</sup> the Court undermined any harmonizing effects of the Hague Evidence Convention,<sup>204</sup> and also failed to provide standards for lower courts to use in balancing competing interests between the United States and foreign nations.<sup>205</sup> *NML Capital* compounds this problem, adding nothing but confusion and tension to U.S. jurisprudence.

Moreover, *NML Capital* throws into question the separate treatment of foreign state-owned entities and the state itself. While separate corporate entities are founded on the doctrine of limited liability,<sup>206</sup> lower courts are increasingly interpreting the actions of central banks as those of a “private player,” opening assets to attachment and execution and weakening the protections under the FSIA.<sup>207</sup> This judicial trend, combined with *NML Capital*, means that central banks or other state-owned entities could potentially be deprived of sovereign immunity in transnational discovery post-judgment proceedings. As such, a plaintiff could access sensitive information and data concerning a sovereign nation via litigation with the central bank.

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201. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

202. See *supra* Part II.B.2. See also Thomas Scott Murley, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 *FORDHAM L. REV.* 877, 891 (1982) (noting that the lack of precedential value may be responsible for the divergent analyses used by lower courts regarding discovery and foreign blocking statutes).

203. *Aérospatiale*, 482 U.S. 522.

204. See *supra* Part II.B.4.

205. See *supra* Part II.B.2. (While suggesting that the Restatement (Third) factors were the right factors to balance, the Supreme Court failed to create a binding precedent from its decision.).

206. See Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 *J. TRANSNAT'L L. & POL'Y* 1, 18 (2008) (discussing the separate legal entity as promoting investment, entrepreneurship, and economic growth, without liability attributed to the sovereign or parent company).

207. 28 U.S.C. § 1611(b) (1996) (carving special protections for central bank property). See Engellenner, *supra* note 82, at 394 (noting the trend in lower courts in exposing central bank assets to attachment and execution).

Ultimately, *NML Capital* continues the trend of U.S. courts thrusting American discovery on the world. Perhaps this is a case of misery loving company. But with many domestic litigants already critical of numerous aspects of U.S. discovery,<sup>208</sup> the United States should be hesitant to impose these rules on parties often unfamiliar and ill-equipped to manage them in transnational disputes. In addition to being overly broad, costly, and burdensome, U.S. discovery in civil proceedings can expose parties to both criminal penalties in their foreign jurisdictions and a heightened risk of sensitive and irrelevant information disclosure. This is particularly troubling for sovereign nations where a disclosure of information and data could compromise privacy and security interests.

*D. The Majority Opinion Disregards the Important Roles of Comity and Reciprocity, Creating Uncertainty and Tension in U.S. International Relations and Diplomacy*

While the majority opinion, penned by Justice Scalia, was quick to dismiss the international relations consequences of its decision in *NML Capital*,<sup>209</sup> the majority opinion in *Aérospatiale*, also joined by Justice Scalia, noted that:

[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.<sup>210</sup>

While the majority in *NML Capital* is correct to point out that the FSIA is the only factor in determining sovereign immunity, and that the common law history is no longer authoritative,<sup>211</sup> the doctrine of comity has not been erased and still has a place in modern transnational disputes. Comity has traditionally been an important element of U.S. jurisprudence,<sup>212</sup> and it can facilitate stronger

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208. See John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 505–06 (2000) (noting that American discovery remains “the most debated, and in some cases the most fractious and vexing, aspect of litigation today”).

209. *Discovery Case*, 134 S. Ct. at 2258.

210. *Aérospatiale*, 482 U.S. at 546.

211. *Discovery Case*, 134 S. Ct. at 2256.

212. *Aérospatiale*, 482 U.S. at 546; Brewer, *supra* note 94, at 534–35.

sovereignty as a flexible, diplomatic solution, rather than a rigid, compulsory international framework.

Indeed, the Supreme Court has actually stated that deference should be given to the doctrine of comity. In *F. Hoffmann-La Roche Ltd., v. Empagran S.A.*,<sup>213</sup> the Court noted that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” a rule consistent with the principles of customary international law.<sup>214</sup> In his dissenting opinion in *Hartford Fire Ins. Co. v. California*,<sup>215</sup> Justice Scalia advocated the use of “prescriptive comity,” a doctrine where courts first assume that Congress has taken comity into account when enacting the law, and then interpret the law with this assumption in mind.<sup>216</sup> Justice Scalia further reasoned that “[c]omity in this sense includes . . . principles that ‘in the absence of contrary congressional direction,’ are assumed to be incorporated into our substantive laws having extraterritorial reach.”<sup>217</sup>

In fact, the United States Government considers immunity from execution under the FSIA as part of a “carefully constructed framework [that] preserves comity” in balancing sovereign immunity concerns.<sup>218</sup> While a U.S. court may render a judgment against a foreign state, the FSIA permits immunity from execution and attachment of a foreign sovereign’s property, notwithstanding certain statutory exceptions.<sup>219</sup> This protection is important as “judicial seizure of a foreign state’s property may be regarded as a serious affront to the state’s sovereignty and affect [the U.S. Government’s] relations with it.”<sup>220</sup>

While the Supreme Court is not the State Department, it should not completely disregard the importance of comity and reciprocity as it did in *NML Capital*. The United States noted in its amicus brief

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213. 542 U.S. 155 (2004).

214. *Id.* at 164.

215. 509 U.S. 764 (1993).

216. *Id.* at 817 (Scalia, J., dissenting) (discussing the use of prescriptive comity to limit the use of U.S. antitrust law in foreign jurisdictions).

217. *Id.* (citing *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 382–83 (1959)).

218. Brief for the United States, as Amicus Curiae in Support of Petitioner, *Discovery Case*, 134 S. Ct. 2250 (No. 12-842), available at [http://www.americanbar.org/content/dam/aba/publications/supremecourt\\_preview/briefs-v3/12-842\\_pet\\_amcu\\_usa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supremecourt_preview/briefs-v3/12-842_pet_amcu_usa.authcheckdam.pdf).

219. 28 U.S.C. § 1610(a) (2012).

220. Brief for the United States, *supra* note 219, at 9.



supporting Argentina that, “some foreign states base their sovereign immunity decisions on reciprocity.”<sup>221</sup> The Court also recognized the importance of reciprocity in *Boos v. Barry*,<sup>222</sup> where it noted that respecting the diplomatic immunity of foreign sovereigns will accord the United States the same vital treatment.<sup>223</sup> The U.S. Supreme Court has also recognized the important role international reciprocity plays in upholding judgments. In *Hilton v. Guyot*,<sup>224</sup> the Court found that while there was no prejudice, fraud, or lack of due process in the French courts, U.S. judgments were not given conclusive effect there, so the Court would not give conclusive effect to the French judgment.<sup>225</sup>

*NML Capital* opens the door to adverse reciprocal treatment for the United States abroad.<sup>226</sup> Under reciprocal treatment, a foreign court can set itself up as a “clearinghouse” for “information about assets and transactions of the U.S. Government throughout the world,”<sup>227</sup> and need only cite *NML Capital* for justification. It is also worth noting that private litigants, not another sovereign, initiated *NML Capital*. Consequently, general and broad discovery about the U.S. Government’s assets throughout the world could be compelled at the instigation of a foreign private litigant.

The reality is that the rapid and consistent growth of the global economy means that, more often than not, U.S. multinational corporations will be involved or at least implicated in transactions and litigation where foreign legal systems and discovery play an important role.<sup>228</sup> It would be best to have strong foreign relations

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221. *Id.* at 20 (quoting *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert denied, 469 U.S. 881 (1984)).

222. 485 U.S. 312 (1988).

223. *Id.* at 323–24.

224. 159 U.S. 113 (1895).

225. *Id.* at 119–21. Although it is an old case, *Hilton* is still the leading law and deserves analysis. See Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKLEY J. INT’L L. 150, 155 (2013) (noting that there is no federal law or treaty governing the recognition and enforcement of foreign judgments in the United States, and that therefore the *Erie* Doctrine prescribes that state law applies, even in federal courts).

226. Brief for the United States, *supra* note 219, at 20. See also *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (noting that “reciprocal self-interest” is a foundation for foreign sovereign immunity).

227. Brief for the United States, *supra* note 219, at 21.

228. See Paul Robert Eckert, *Utilizing the Doctrine of Adverse Inferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative*, 37 WM. & MARY L. REV. 749, 749 n.1 (1996) (acknowledging that “[w]ith the growth of a modern, global economy, commercial business transactions routinely involve multinational

and adaptable diplomacy embodied in the doctrines of comity and reciprocity, rather than a hostile, forced export of U.S. discovery.

*E. Sovereign Debt and Discovery Proceedings Are Not “Run-of-the Mill”*

The Court noted, without deciding, that discovery from nonparty banks about the judgment debtor would be permitted in “run-of-the-mill” execution proceedings.<sup>229</sup> The implication is that since Argentina did not raise the fact that it is “Argentina,” the Court did not have to consider its sovereign status. Sovereign debtors are not typical debtors for the obvious reasons that they are *countries*, and while they have consented to engage in international commerce and to accept foreign direct investment, the ramifications of default and intrusive discovery *must* be considered.<sup>230</sup>

Sovereign insolvency is nothing new,<sup>231</sup> and is certainly not a historical anomaly.<sup>232</sup> As the Argentine default teaches, the modern world and global economy only increase the potential for gain and loss.<sup>233</sup> Incidents of international financial crisis have increased since the 1990s, particularly among emerging-market countries.<sup>234</sup>

Sovereign debt is not just a problem for debtor and creditor—it is a global issue with far reaching implications. As the ever-growing global market continues to embrace sovereign bonds, so grows the risk that one country’s default could “trigger systemic collapse.”<sup>235</sup> While there is a dogmatic belief (mostly espoused by creditors) that

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corporations with offices located in and subject to the laws of, a foreign jurisdiction.”).

229. *Discovery Case*, 134 S. Ct. at 2255.

230. See Nate Raymond, *Argentina Faces Skeptical U.S. Court Over Creditors’ Subpoenas*, REUTERS (Dec. 17, 2014, 6:25 PM) <http://www.reuters.com/article/2014/12/17/argentina-debt-appeal-idUSL1N0U136020141217> (noting that the Second Circuit acknowledged that Argentina is not an ordinary litigant).

231. See de Jonge, *supra* note 10, at 129 (noting that Philip II of Spain declared a moratorium on the repayment of debts several times during the 1500s).

232. See INT’L MONETARY FUND, SOVEREIGN DEBT RESTRUCTURING—RECENT DEV. AND IMPLICATIONS FOR THE FUND’S LEGAL AND POLICY FRAMEWORK 1 (Apr. 26, 2013) available at <https://www.imf.org/external/np/pp/eng/2013/042613.pdf> (noting the sovereign debt restructurings of Greece in February 2012, Belize in 2007 and 2013, Jamaica in 2010 and 2013, and St. Kitts and Nevis in 2012).

233. See Fernando M. Martin & Christopher J. Waller, *Sovereign Debt: A Modern Greek Tragedy*, 94 FED. RESERVE BANK OF ST. LOUIS REV. 321, 321 (noting the recent financial crises of Portugal, Ireland, Italy, Greece, and Spain).

234. Andy Haldane & Mark Kruger, *The Resolution of International Financial Crises: Private Finance and Public Funds*, BANK OF CAN. REV., Winter 2001–2002, at 4.

235. See de Jonge, *supra* note 10, at 146.

sovereign debt obligations and restructuring should focus on the reality of private law (i.e., “a contract is a contract”), this view fails to encompass the whole picture because it ignores the distinct features that separate sovereign defaults from those in the private sector and the important public international law issues at stake.<sup>236</sup>

Unlike a private financial crisis, there are no bankruptcy proceedings in sovereign defaults, creating a number of unique distinctions for debtor-countries. Creditors have little motivation to negotiate timely and moderate deals because there is no threat of bankruptcy to contend with.<sup>237</sup> Additionally, under the terms of many outstanding bonds, minority holdout creditors cannot be forced to join a settlement that has been accepted by the majority of creditors, something that would occur in bankruptcy proceedings.<sup>238</sup> Also, sovereign debtors cannot invoke protection against “hostile creditors” and are therefore subject to creditor lawsuits.<sup>239</sup>

Creditor consensus is another distinguishing feature that creates unique problems during sovereign debt restructurings. If a sovereign nation wishes to continue participating in the global financial markets, it cannot restructure its debt without the consent and participation of its creditors.<sup>240</sup> But it is precisely this need for consensus that can allow creditors to hold out during debt restructuring, as they did in *NML Capital*.

The holdout problem has been compounded as sovereign debt financing has shifted toward bondholder investing rather than traditional bank lending.<sup>241</sup> Unlike banks, foreign bondholders and speculators have less incentive to build commercial relationships with a country.<sup>242</sup> Moreover, bondholder investments tend to be smaller

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236. MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* 21 (2011).

237. Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, United Nations Conference on Trade and Development, Discussion Paper No. 198, 6 (Apr. 2010).

238. *Id.*

239. *Id.*

240. Steven L. Schwarcz, “*Idiot’s Guide*” to *Sovereign Debt Restructuring*, 53 EMORY L.J. 1189, 1192 (2004) [hereinafter “*Idiot’s Guide*”].

241. *Id.* at 1193.

242. *Id.* See also Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 1004 n.283 (2000) [hereinafter *Restructuring*] (utilizing the example of the 1999 Russian debt arrears to demonstrate that investors are motivated to accelerate debt, whereas, bank lenders “want future business with Russia” and therefore “may be unwilling to pressure the Government on the [debt] arrears”).

than traditional bank loans, leading to a greater number of bondholders to negotiate with and increasing the risks of a holdout.<sup>243</sup> As *NML Capital* teaches, holdout problems create unique litigation and repayment issues that are not present in private sector financial crises.

A common remedy offered to combat the holdout problem is the inclusion of collective action clauses (CAC) in a bond deal agreement. CACs are private-law solutions that permit changes to the agreement's payment terms through a vote of the creditors.<sup>244</sup> But CACs are not a straightforward answer. First, voting thresholds are not standardized and can vary significantly—from 19 to 75 percent.<sup>245</sup> Second, there may be procedural requirements attached to CACs (i.e., a requirement of a bondholder meeting before a vote) that raise costs and may create barriers to negotiations.<sup>246</sup> Importantly, CACs do not bind creditors across bond agreements meaning creditors may be incentivized to vote against restructuring their own agreements in case another set of creditors holds out,<sup>247</sup> creating a "Prisoners' Dilemma" situation.<sup>248</sup> With a large number of creditors, a CAC can be rendered impotent.

There is also concern that broad discovery against a sovereign can create risks to national security and undermine the authority of a nation as a sovereign. Holdout creditors are not just seeking information regarding Argentine assets, but also information regarding Argentine military equipment and diplomatic property.<sup>249</sup> It does not take much imagination or understanding of foreign sovereign immunity or post-judgment execution discovery to realize that this is potentially quite problematic.

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243. *Idiot's Guide*, *supra* note 241, at 1193.

244. Buchheit, *supra* note 238, at 16 (discussing that CACs were introduced to bonds governed by New York law in 2003, having already been a standard feature of bonds governed by UK law).

245. Stephen J. Choi et al., *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 142 (2012).

246. *Id.*

247. *Id.* (explaining that creditors from one bond deal will want to ensure they receive as close to repayment on their bonds as possible; if they submit to restructuring at a fraction of the price, then creditors from a separate bond deal could hold out and receive more money).

248. See Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and the Law*, 82 S. CAL. L. REV. 209, 215–16 (2009) (explaining the classic game theory that in the absence of mutually assured cooperation, two entities are incentivized to not cooperate).

249. Raymond, *supra* note 231.

## V. CONCLUSION

In *Republic of Argentina v. NML Capital, Ltd.*, the Supreme Court permitted post-judgment discovery in-aid-of execution upon a sovereign's extraterritorial assets, though no showing had been made that the information sought was reasonably calculated to lead to attachable property.<sup>250</sup> The Court found that since the subpoenas were neither targeted at Argentina nor Argentine property, but rather, targeted at non-party banking institutions concerning general information about Argentina's world-wide assets, permitting discovery did not violate the FSIA.<sup>251</sup> But by refusing to consider the relevancy of the discovery requested – as required by the FRCP – the Court rendered a ruling that violates a fundamental tenet of U.S. discovery law.<sup>252</sup> Furthermore, the Court's disregard of the doctrines of comity and reciprocity will jeopardize the U.S. Government's international relations, creating uncertainty and contention.<sup>253</sup> Importantly, the Court's treatment of the Argentina sovereign debt crisis as a "run-of-the-mill" proceeding oversimplifies a complex and controversial issue.<sup>254</sup>

As it stands, *NML Capital* contributes to an already problematic jurisprudence that fails to provide lower courts a consistent analytical model to balance U.S. interests against foreign blocking statutes when determining whether to compel transnational discovery.<sup>255</sup> But *NML Capital* has gone one step further. By compelling discovery about a sovereign's extraterritorial assets even though they may be immune from execution, the Court has opened an uncertain door that neither the FSIA nor Congress intended.<sup>256</sup>

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250. *Discovery Case*, 134 S. Ct. at 2256–57.

251. *Id.*

252. *See supra* Part IV.A.

253. *See supra* Part IV.B.

254. *See supra* Part IV.C.

255. *See supra* Part IV.A.

256. *Id.*